



## MONTGOMERY COUNTY ETHICS COMMISSION

Steven Rosen  
*Chair*

Kenita V. Barrow  
*Vice Chair*

May 18, 2017

Advisory Opinion 17-04-006

The Commission on Common Ownership Communities (CCOC) requests an advisory opinion with respect to three scenarios about implementing part of its mandate to educate common ownership community officials and residents on responsible governance. As part of its mission, the CCOC must provide training on the responsibilities of board members of governing bodies of common ownership communities by:

- (1) developing an educational curriculum for new members; and
- (2) approving an alternative educational curriculum for new members administered by other organizations.

Code Section 10B-6(f).

Members of the governing body of a common ownership community must successfully complete the educational curriculum developed by the Commission or a similar educational curriculum administered by another organization that is approved by the Commission. 10B-17(h).

The CCOC asks three questions:

1. Can attorneys who practice before the CCOC volunteer to participate in seminars presented by the CCOC or prepare forms, checklists, and other similar documents which the CCOC will offer associations without becoming subject to the County's ethics laws applicable to public employees?
2. Can attorneys who practice before the CCOC be compensated to participate in these seminars or in preparation of the documents offered associations without becoming subject to the County's ethics laws applicable to public employees?

3. Could volunteer panel chairs, who are public employees, participate in the seminars and prepare forms, checklists, and other similar documents the CCOC will offer? (This question does not specify whether these individuals will be compensated in connection with this activity.)

I. Use of Attorneys (Unaffiliated with the CCOC) To Participate in Seminars

The question of whether volunteers are subject to the ethics laws is a function of whether they are “public employees” under the County’s ethics law. Pursuant to 19A-4(m) of the Public Ethics Law, a public employee includes:

- (5) any . . . person providing services without compensation to a County agency if that person:
  - (A) exercises any responsibility for government-funded programs, procurement, or contract administration for an agency; or
  - (B) has access to confidential information of an agency that relates to government-funded programs, procurement, or contract administration.

Whether an individual is a public employee pursuant to 19A-4(m)(5) will depend on the facts, including how those facts develop over time. A person who was not acting as a public employee could become a public employee if additional facts arise that meet the standard in the definition of public employee. So, for example, the Commission presumes that nonaffiliated individuals who volunteer to provide information at seminars would be performing these services without “access to confidential information of an agency.” But if at some point, such a volunteer was provided with access to confidential information relating to the CCOC or related government-funded programs or procurement activities, then that person would become a public employee pursuant to 19A-4(m)(5)(2).

Under 19A-4(m)(5)(1), the issue is whether these volunteers will exercise any responsibility for “government-funded programs, procurement or contract administration for an agency.” Whether they take on responsibility for the CCOC’s education program, or a portion thereof, really comes down to what is being asked of them. For example, if responsibility for the administration of the program remains with the CCOC and its employees, but a volunteer attorney appears at a seminar and delivers the curriculum the CCOC has developed or approved pursuant to the requirements of 10B-6(f), it would not appear that responsibility for the administration of the program would be with the volunteer attorney. On the other hand, if the CCOC seeks to have a volunteer lawyer develop curriculum pursuant to the authority in 10B-6(f)(1) or assigns to the volunteer total responsibility for running a seminar, including scheduling, notifications, materials and instruction, it would appear that it had turned over a portion of the responsibility for execution of its educational mandate to the volunteer.

There is a continuum of possibilities, and it is up to the CCOC to ensure that if it does not want volunteers to be considered public employees subject to the public ethics law, it cannot delegate responsibility for the CCOC program to these persons. To be clear, having volunteer attorneys

deliver CCOC curriculum would not by itself establish these volunteers as “public employees.” Volunteer attorneys would also not be considered “public employees” for appearing as guest lecturers at CCOC sponsored seminars.

The Commission considered whether the recruitment of volunteers might either constitute a prohibited solicitation of a gift under 19A-16 or otherwise implicate the misuse of the prestige of office. The Commission decided these provisions would not be implicated where recruitment of volunteers was general in nature and not targeted at particular individuals.<sup>1</sup> As a quasi-judicial entity with the power to decide cases that affect, as you say, the “livelihood” of these individual attorneys, the CCOC should be particularly sensitive to the notion that persons who practice before it may feel hard-pressed to refuse to participate in a “volunteer” program, and that the attorneys who participate in these activities may expect special and unspoken consideration in representing clients in matters before the CCOC. Furthermore, the Commission recommends that the CCOC’s acceptance of responding individuals to participate in the volunteer program be based on pre-stated minimum qualifying criteria. And, the Commission recommends that these persons who are recruited as volunteers be counseled that these speaking opportunities and participation in CCOC programs should not be used for advancement of their “livelihood” or to advance any individual or business’s financial interest.

## II. Compensation of Attorneys to Provide Services

The second question asked by the CCOC is whether attorneys who practice before the CCOC can be compensated to participate in these seminars or in preparation of the documents offered associations without being becoming subject to the County’s ethics laws applicable to public employees. The answer to this is yes, the County can contract through its procurement policies and practices to hire persons to perform services. These contractors would not be public employees and instead would be subject to the requirements of the County Code Chapter 11, Article XII, Ethics in Public Contracting. Whether there are any legal ethics considerations flowing from the attorneys being licensed in Maryland and representing parties before a government agency which is separately compensating the attorney is beyond the scope of the jurisdiction of the Montgomery County Ethics Commission and may be appropriate for addressing to the Maryland Office of Bar Counsel.

## III. Volunteer Panel Chairs Assisting with Training Activities

The third question concerns whether volunteer panel chairs could participate in the seminars and prepare forms, checklists, and other similar documents the CCOC will offer. As these individuals are already considered public employees, having the individuals perform additional

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<sup>1</sup> In the last full paragraph of your letter, you reference a scheduled seminar with “attorneys who have agreed to serve as presenters.” Clearly, the scheduling and staffing of the seminar was undertaken in advance of your request for an advisory opinion. The Commission recommends that the decision to go forward with seminars take into account the advice contained in this advisory opinion, including that pertaining to the recruitment of attorneys to participate in the activity.

duties does not result in a change in their status as public employees, with the ethics law being fully applicable to their activities.

### Conclusion

The County Council's legislative findings in adopting the County's Public Ethics Law states:

(a) Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.

(b) The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence. . . .

(d) The Council intends that this Chapter . . . be liberally construed to accomplish the policy goals of this Chapter . . . .

As the implementation of the proposed CCOC program contemplates activities that are on a continuum where at one end substantial risk of violations of the County's ethics laws exist while at the other the risk is minimal, the Commission recommends that the CCOC keep in mind these legislative findings. As the law states, the confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence. Where volunteers are utilized by an agency to advance an agency's interests but those same volunteers have the potential to gain by agency action, concerns about improper influence and the appearance of such should be at the forefront in the design of the agency's program.

This advisory opinion is limited to the facts presented in the request for an opinion.

For the Commission:



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Steven Rosen, Chair